

INVESTIGATION INTO THE ACTIVITIES OF THE

VERMONT STATE POLICE

BY THE OFFICE OF THE ATTORNEY GENERAL

1980

"Diamond - Potter Report"

office resources, the degree of culpability, the likelihood of conviction and other public interests.

On April 29, 1980 Philbrook replied that he would voluntarily provide the requested information.

B. Attempts to close down the Costello Committee's "Open Window" proposal

Shortly after Philbrook's appointment, the Vermont Legislature began its revision of statutes relating to the rights of State Police officers in disciplinary and promotional matters. A special committee from the Vermont House of Representatives, the "Costello Committee" held hearings on State Police abuse of its members. It found that "the department suffers from an impaired capacity to deal expeditiously and justly with allegations of wrongdoing." The Committee cited the failure of the Department to respond to a performance audit report conducted by the House Appropriations Committee in 1975. That Performance Audit report notes, at p. 31, that

"The Committee found that the major problems of the Department of Public Safety lie in the area of personnel management. Those now running the Department are imbued with an outdated philosophy of police management viewing the troopers as enlistees subject to their unchecked command and having few personal rights. This philosophy tends to incline the Department's leadership to act in secrecy with continual hints of retribution to those expressing discontent." [Emphasis added]

The Costello Committee also noted that the State Police failed to investigate allegations that an officer committed serious perjury after the matter had been brought to the attention of the highest ranking officers in the department, and the failure of command officers to follow through with an internal investigation into the router bit affair.

To correct this problem, the Costello Committee suggested "open window legislation" to insure that, in the future, other investigative authorities would prevent the department from covering over allegations of criminal misconduct on the part of troopers. The Committee articulated a need to require that all allegations of criminal misconduct on the part of troopers and the disposition of resulting internal investigations be reported to the State's Attorney, Attorney General and the Governor. By requiring the department to make reports to these other authorities at the outset, the department would not easily be able to ignore or white-wash serious allegations of trooper misconduct.

In response to the report of the Costello Committee, the Vermont House of Representatives passed H. 738 on March 28, 1980, which adopted an "open window" policy. The bill would require the Commissioner of Public Safety to report all complaints of conduct by troopers which might possibly involve criminal activity. It

requires that "The head of the Internal Affairs Unit [of the Department of Public Safety] also shall IMMEDIATELY report the ALLEGATION [of misconduct of a state police officer received from the public or another officer]. . . to the Attorney General UNLESS the head of the unit makes a determination that the ALLEGATIONS do not include a violation of a criminal statute." This language was approved by the Senate and signed into law by the Governor as 20 V.S.A. §1921(a)(4).

But before this language became law, Commissioner Philbrook made several attempts in the Senate Government Operations Committee to remove the requirement that his department must report allegations involving criminal conduct to prosecutorial authorities. He submitted draft legislation which eliminated the mandatory reporting requirement and vested discretion in the Commissioner to deliver information to prosecutors "when he [the Commissioner] deems it appropriate". He then testified before the Senate Government Operations Committee that his draft vesting reporting discretion in the Commissioner, would satisfy the Costello Committee's desire for open window legislation.

Philbrook's contentions and his draft were quickly rejected by the Senators. Senator Partridge responded that the Commissioner did not need to exercise his own discretion as to what information to turn over to prosecutors. Senator Sorrell then noted that the House Bill explicitly required that these materials be turned over to the Governor and the Attorney General. Senator Sorrell stated that the Attorney General should know and asked why Philbrook wanted to delete this reporting requirement. Senator Sorrell told Philbrook that she preferred making the reporting to the Attorney General of all allegations embracing possible criminality by troopers mandatory rather than vesting discretion in the Commissioner.

The next day, however, Philbrook submitted a proposed draft of the bill which, once again omitted the requirement that the internal affairs unit immediately report allegations of trooper misconduct embracing criminality to the Attorney General. This draft only stated that the Commissioner shall deliver records of the Internal Affairs Unit "as may be necessary to appropriate prosecutorial authorities having jurisdiction." He then submitted still another draft with the same omissions. These were rejected in favor of the original language of H. 738. Philbrook's Legislative activity clearly demonstrates his thorough knowledge and complete understanding of what the law requires of him.

C. The Manipulation of the Jollata Allegation.

In the fall of 1980, Sgt. James Jollata told Lt. Fish that he had walked into a conversation about troopers and router bits between Spear and Reed in the B.C.I. room at Redstone. Fish asked Jollata why he had not said something about this before. Fish advised Jollata to report the conversation to internal affairs. Jollata, who was first on the list to be promoted to fill a vacancy created by the retirement of his immediate superior,

evidently did not make a report. In October 1980, Fish himself reported the matter to Col. Philbrook by written memorandum. The matter is important to the Attorney General because if the conversation which Jollata overheard occurred before July 24, 1979, the date the router bit allegations appeared in the press, it would implicate Capt. Spear and Lt. Ramey in covering up the matter and lying about it under oath at the Caledonia County Inquests and the Reed Disciplinary Hearing.

Lt. Mooney, head of the State Police Internal Investigation Unit, interviewed Sgt. James Jollata. According to Mooney, the entire conversation was recorded. A typewritten transcript was made of the tape and placed in a file in the records of the internal affairs unit.

The transcript of Mooney's interview of Jollata clearly states that Jollata was not, at that time, able to recall when the conversation between Reed and Spear took place.

"Do you remember when it would have been?" "That is a problem, I cannot tell you what time frame it was at all". "It was probably at the last end of my B.C.I. tour". . . "I don't know the time frame of when this took place. I didn't pay any attention to it at the time, thought very little of it. In fact, I didn't even remember it until after things got going, got hot in the papers and so on". . . . "Best of your recollection then, it was a little over a year ago?". . . "So it had to be before that but I really can't tell you when or what date it was or anything like that."

Mooney's interview of Jollata did not satisfy Col. Philbrook. Despite the clear Legislative intent that the Internal Affairs Unit should operate independently and without interference from the Commissioner, Philbrook undertook the investigation of the Jollata allegation himself.

Philbrook interviewed Jollata. Before asking Jollata any questions, Philbrook told Jollata that the purpose of the interview was to determine the date of the Spear-Reed conversation and that the conversation must have occurred after the router bit affair was published in the press. Philbrook to Jollata: "I had some questions about the time sequence of the conversation that he, ah, stated that he overheard". "On the following page you make a statement, ah, 'as soon as I realized it was the bits they were talking about, I left, felt it was none of my business' and having read that, it seemed to me that, ah, you were aware at the time of that conversation, ah, about the so-called router bit affair in St. Johnsbury."

The state police file in this matter which has been turned over to the Attorney General contains no statement of Jollata from which Philbrook could have concluded that Jollata did not know of the router bit affair prior to the press accounts. We do not know what alleged statement of Jollata's Philbrook was reading from, or if there was one. But Philbrook's leading interrogation provoked an affirmative answer from Jollata. This answer appears to contrast with Jollata's prior inability to fix the date of the conversation and his prior statement to Mooney that at the time he heard the subject matter of the conversation he didn't pay any attention to it and thought very little about it UNTIL things got going in the press. It is also questionable that Philbrook would have taken the matter out of Mooney's hands and conducted another interview if Jollata's existing statements established that Jollata knew about the router bit affair from the papers before he walked in on Spear and Reed.

Philbrook resolved the allegation by fixing the date of the conversation after the router bit matter became public knowledge. By making this determination Philbrook exonerated Spear and Ramey from covering over Reed's router bit allegation. Philbrook claims that his resolution of the allegation in a non-criminal way excused him from any duty to report the allegation to the Attorney General. Neither he nor Mooney reported the Jollata allegation to the Attorney General.

Because one possible resolution of the allegation, on its face and without investigation embraces criminal conduct, 20 V.S.A. §1921(a)(4) clearly mandates that Mooney should have reported the allegation to the Attorney General. The statute excuses the head of the Internal Affairs Unit from reporting the ALLEGATION to the Attorney General ONLY if he makes a determination that the ALLEGATION does NOT embrace criminal conduct. Since the report must be immediate and is based only on the allegation itself, the head of the internal Affairs Unit is not entitled to base his decision to NOT report on any factual investigation. In order to prevent State Police cover-ups the duty to report cannot, of necessity, be entrusted to the discretion of the State Police as they themselves apply it to their own investigation of the facts. Philbrook acknowledges that no decision was made NOT to report this allegation to the Attorney General. Where no decision is made, there is a duty to report. That the department defaulted in making a decision is, itself, a violation of the statute.

Furthermore, this allegation concerned the very area into which the Attorney General was conducting his criminal investigation. By fixing the date of the Spear-Reed conversation after July, 1979, Philbrook could claim it had nothing to do with the cover-up and perjury questions then being investigated by the Attorney General.

By preventing the Attorney General from learning of the matter, Philbrook could prevent him from investigating it. This was exactly the kind of thing that the Legislature, by enacting 20 V.S.A. §1921(a)(4), was trying to prevent.

The Attorney General learned about the Jollata allegation through independent sources. We spoke to the participants of the conversation, Reed and Spear, both of whom claimed that the conversation occurred in 1978, a year before the router bits matter got into the press. The file of the Internal Affairs Unit on the Jollata allegation does not contain any indication that Reed or Spear were interviewed in connection with it. Reed was not interviewed. Spear was interviewed by Philbrook and told him that the Reed conversation occurred in 1978. Philbrook initially denied interviewing Spear on the subject but changed his recollection when told we had already spoken with Spear about it. Philbrook ordered the investigation closed. It has since been reopened at the request of the State Police Advisory Committee.

We note that the manner in which Philbrook conducted the investigation of the Jollata allegation was not reasonably directed at resolving the matter on a factual basis. The file did not reflect that either of the participants of the conversation had been questioned, Reed was not questioned, the date that Spear gave disagreed with the Commissioner's determination and was not even mentioned in the file, the answers on which Philbrook based his decision were procured by his own tactics and were not supported by the record prior to Philbrook's involvement and the allegation was not reported to the Attorney General as required by 20 V.S.A. §1921(a)(4).

Philbrook did not limit his resistance to disclosure by merely failing to report Lt. Fish's "Jollata" allegation to the Attorney General. As has been mentioned, we learned about the allegation from other sources. At court, Philbrook refused to answer questions about the "allegation" and his handling of it. He claimed that the matter was confidential, even when sought by an Assistant Attorney General during a criminal investigation. The Court, however, ordered Philbrook to answer the questions, which he then did.

In the light of all these circumstances, the manner in which Philbrook resolved the allegations so that Spear and Ramey were exonerated of implications of cover-up and perjury, does, itself, have the appearance of a cover-up.

D. Philbrook Claimed Discretion To Limit What The Attorney General Can Subpoena In A Criminal Investigation.

Because of the possibility that this was not the only "misconduct allegation" relevant to its ongoing criminal investigation which the State Police had failed to report, the Attorney General's Office subpoenaed the Internal Affairs Unit's log of complaints. On the instructions of Commissioner Philbrook, the department moved to quash the subpoena. The department's legal memorandum on its motion argued to the court that the statute vested the Commissioner with the discretion to determine whether the prosecutor was a proper one and what material it was appropriate for the State Police Internal Affairs Unit to turn over to the prosecutor. This was precisely the same proposal Philbrook had made to the Senate Government Operations Committee. The court, like the Legislature, rejected Philbrook's contentions. That night, with an Assistant Attorney General present, the court reviewed all the complaint logs of the Internal Affairs Unit, including the "Jollata" complaint file.

In summary, if Col. Philbrook had intended to obstruct the Attorney General's ongoing criminal investigation into the conduct of the State Police, it is unlikely that he could have done more to try to thwart it. His actions include:

- refusing for six weeks to provide the Attorney General with requested department records;
- unsuccessfully attempting to manipulate the handling of an allegation that Sgt. Jollata overheard a discussion about router bits which is evidence directly related to the Attorney General's criminal investigation into whether there was neglect of duty (cover-up) or perjury by state police hierarchy in the router bit matter, by -
 - : Taking control over the internal investigation away from the department's Internal Affairs Unit and conducting the investigation himself;
 - : Interviewing only two of the three known witnesses to the conversation, (Spear and Jollata);
 - : Recording in the department's file, the version of only one of the known witnesses to the conversation, (Jollata);
 - : Leading the one witness whose version is recorded in the department file (Jollata) to give answers which would tend to exculpate other police officers from cover-up or perjury;

- : Leading Jollata to give the desired answers by suggesting he had already given those answers although the file did not reflect that Jollata had already given those answers;
 - : Failing to make the file reflect that Spear had been interviewed about the conversation;
 - : Failing to let the file reflect that Spear placed the date of the conversation during 1978, a contention which conflicted with Philbrook's finding;
 - : Failing to immediately report the allegation to the Attorney General as required by 20 V.S.A. §1921 (a)(4);
 - : Unsuccessfully attempting to exempt himself from answering, at judicial proceedings, questions about his handling of the Jollata allegations.
- Unsuccessfully resisting the Attorney General's investigation into whether the department had failed to report other allegations of trooper misconduct related to the Attorney General's investigation of the router bit affair by filing a motion in court claiming that the Commissioner had discretion to decide what material a prosecutor could subpoena from the department for a criminal investigation.

All of this leads us back to the question of the ability of the State Police to police itself. Commissioner Philbrook lobbied the Legislature to give him discretion as to what state police matters he had to report to prosecutors. Then the Legislature rejected his contentions and made it mandatory that he report any allegations unless it was apparent on the face of the allegation that criminal conduct was not involved. In the Jollata allegation, a matter which Philbrook clearly understood was part of the Attorney General's ongoing criminal investigation into the State Police, Philbrook ignored the Legislature's reporting requirement. Philbrook then manipulated the facts surrounding the allegation to exculpate police officers who would otherwise be implicated in criminal conduct within the sphere of a matter then being investigated by the Attorney General. When the Attorney General learned about the Jollata allegation from other sources, Philbrook continued to resist disclosing his part in the matter claiming that he had discretion to determine what material the Attorney General could obtain from the department during a criminal investigation.

As the Costello Committee pointed out, the State Police have been unable to learn from history to correct their mistakes. Those who do not learn from history must relive it. Col. Philbrook does not wish to or is unable to, fulfill that part of his responsibility which requires his policing the police in the manner that the people and the Legislature demand.

13. EDWARD FISH

This case reflects numerous instances of high ranking officers in the State Police acting in a manner which was less than exemplary. But not every action taken by every State Police officer in this matter has been negative. There has been meritorious service here too. In addition to Sgt. Reed, Lt. Fish resisted the pressure of the "company man" attitude and acted responsibly with conscience and independent judgment. He chaired the Panel which found the charges against Reed unsupported. To do this he went against strong sentiment in the department. When Commissioner Cone sought to discuss the matter with him ex parte before one last portion of the case had been resolved, Fish placed the communication on the record of the proceeding and abstained from making any further decisions in the case.

Later, after the Legislature enacted a statute requiring members of the department to report allegations of misconduct, Fish heard a fellow trooper say that he had overheard a conversation between Reed and Spear in the B.C.I. office about router bits. Fish encouraged that officer to report the conversation. When the officer did not do so, Fish himself reported it.

Fish's conduct is a fine example of dedication to duty, concern for the department's adherence to the rules and proper exercise of judgment. When it is examined in the context of what those around Fish were doing at the time and the pressures upon Fish to achieve different results, it should be seen as exemplary. The public and members of the department should know of the good things that have been done here. Edward Fish and David Reed are members of the Vermont State Police.

CONCLUSION

This affair is an example of the Vermont State Police's inability to police itself. Had the router bit allegations been thoroughly investigated by the State Police on their own initiative when they first came to light, they would have been easily and quickly disposed of in a manner which would have satisfied the public and Redstone. Instead, it appears that attitudes historically prevalent among ranking officers resulted in a reluctance of junior officers to report the matter or investigate it thoroughly. Senior officers failed to take up the initiative.

But much more serious was the attack on David Reed which his limited inquiry into the matter provoked upon him from his superiors. If fear of such a reaction caused him to be less than complete in his reports and in his publication of his knowledge, that fear was well founded. Even before the matter became public, the displeasure of the department over Reed's inquiry into the router bits matter manifested itself in negative reaction against Reed. But when the matter became public and a public explanation was required, the department's reaction was a full scale assault on David Reed. The department's historical reluctance to cope with allegations of trooper misconduct is the real problem and should have been the department's focus.

The department's attitude may well account for the absence of written guidelines assigning procedures and delegating responsibilities for the investigation of such allegations.

Reed's failure to fully report the matter to Redstone was a failure of the system rather than a failure of the man. Indeed, Reed exhibited considerably more courage in making the limited revelations that he did than the many others who had some knowledge about the matter. But this "systems" failure sprang from a human failure: a misinterpretation of the "company man" -- "for the good of the force" syndrome. Reed's violation of this unwritten department policy produced a departmental "disciplinary action" against Reed, which was unwritten departmental "policy". High ranking officers cast "entrapment" aspersions upon Reed's name, he was charged as a liar, blamed for the department's inaction in resolving the router bits matter, and disciplinary action was brought against him which could have resulted in his termination from the police force.

These failures are human failures, not systems failures. The people who made them still hold office. There has been no official recognition that this problem exists. There has been no corrective action applied to this "attitude" problem. The public sees this problem and resents it. It is indeed ironic

that the hundreds of honest, dedicated and hardworking men and women of the lower ranks of the State Police, who are both the victims of the "attitude" and innocent of any blame for the continued existence of the "attitude", are the ones who are subjected to daily public insult and criticism because of it. They have neither the ability to defend themselves nor the ability to change their situation.

In 1975, a performance audit of the Vermont State Police conducted by the House Committee on Appropriations recognized the problem. At page 31 the Committee report states:

"The Committee found that the major problems of the Department of Public Safety lie in the area of personnel management. Those now running the department are imbued with an outdated philosophy of police management viewing the troopers as enlistees subject to their unchecked command and having few personal rights. This philosophy tends to incline the department's leadership to act in secrecy with continual hints of retribution to those expressing discontent." [Emphasis added.]

At page 39, the Committee's report states:

"The Committee finds that the Department's present leadership is imbued with an outdated philosophy of police management viewing the troopers as enlistees subject to their unchecked command with few personal rights . . . IT IS THE SOURCE OF THE MOST SERIOUS PERSONNEL PROBLEMS uncovered by the Committee . . . these recommendations will mean little if not instituted by a cooperative departmental leadership." [Emphasis added.]

The "attitude" problem is still here, five years later. We are told that older State Police officers are counting the days until they can retire and forget the stigma that has been

created. Young troopers are discouraged and embarrassed into wishing for jobs on any other police force where the pay would be comparable

Vermonters ask a great deal of their state troopers. Troopers are expected to be courteous at all times, required to know and strictly observe the legal rights of others with whom they deal, bound to act with due regard for the facts, and made to spend long -- sometimes dangerous -- hours away from their families. If this investigation raises a single "major" issue, it is "how can we treat our troopers in the matter of their employment so differently from the way we demand that they treat others". They have been retaliated against for noting and discussing violations of the law by other troopers. They have been charged with disciplinary offenses which do not constitute a violation of statute or department rule or regulation. They have been charged and some have been convicted of disciplinary violations for which no factual basis has been shown. They have been rudely treated when they attempted to perform their duty when superiors wish to avoid that duty.

A police force must be capable of policing itself. When Redstone examines the conduct of a trooper, it should be bound by the law and the facts. This investigation reveals that this dangerous "attitude" at Redstone continues to exist despite warnings from the Legislature that it should be corrected.

Now we have another Commissioner of Public Safety. Unfortunately, Col. Philbrook is very much a "company man" himself. The Legislature has recognized that the department's tendency to act in secrecy must be curbed if the "attitude" problem is to be corrected. It has enacted what the Costello Committee has referred to as "open window" legislation. The record reflects that Philbrook clearly understood the intent of the Legislature and attempted to change this intent before the legislation passed. But after his attempts failed and the legislation passed, Philbrook ignored it and kept the Legislature's "open window" closed. It suggests to us that given the particular problems with which the State Police are afflicted, the particular talents and capabilities of Paul Philbrook would better serve state government in some other agency.

This report confirms the findings of the Costello Committee and the 1975 Performance Audit by the House Appropriations Committee. Many of the members of the House Appropriations Committee which prepared the performance audit are still serving the people of Vermont. Anthony Buraczynski, Glendon King, Lorraine Graham, Robert Graf and Walter Moore have been returned by the voters to the 1981 Legislature. Other committee members have been elected to higher office: Madeleine Kunin is Lieutenant Governor, Emory Hebard is State Treasurer and James Douglas will be Secretary of State. Perhaps these people will be able to renew their efforts and be able to do something where, thus far, we have all been unsuccessful.

We need a new "attitude" in Redstone. Even if the State Police have a Commissioner of Public Safety who does not, himself, have the "attitude", his decisions can only be as good as the information on which those decisions are based. Because the "attitude" persists in varying levels of the command, great changes must be made there. Criminal prosecution to effect the necessary changes is a drastic remedy. But, since the public interest demands a change in the "attitude", prosecution is a legitimate last resort if other avenues fail. We therefore defer instituting grand jury proceedings until the Governor, Legislature and the department have a reasonable time to respond to the problem.

At Montpelier, Vermont this 7th day of January 1981.

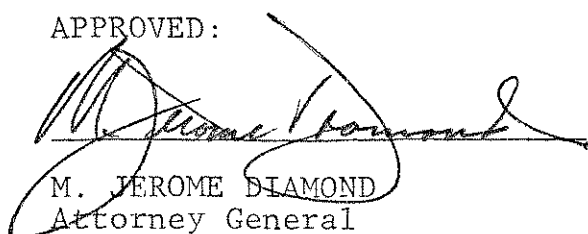
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